



ENVIRONMENTAL PROTECTION AGENCY

[FRL-9503-5]

California State Nonroad Engine Pollution Control Standards; Commercial Harbor Craft Regulations; Notice of Decision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Decision.

SUMMARY: EPA has granted the California Air Resources Board (CARB) its request for an authorization to adopt and enforce regulations for the control of emissions of particulate matter and oxides of nitrogen from new and in-use diesel-fueled engines on commercial harbor craft.

DATES: Petitions for review must be filed by **[INSERT DATE SIXTY DAYS AFTER FR PUBLICATION DATE OF THIS NOTICE]**.

ADDRESSES: EPA has established a docket for this action under Docket ID EPA-HQ-OAR-2011-0549. All documents relied upon in making this decision, including those submitted to EPA by CARB, are contained in the public docket. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Air and Radiation Docket in the EPA Headquarters Library, EPA West Building, Room 3334, located at 1301 Constitution Avenue, NW, Washington, DC. The Public Reading Room is open to the public on all federal government working days from 8:30 a.m. to 4:30 p.m.; generally, it is open Monday through Friday, excluding holidays. The telephone number for the Reading Room is (202) 566-1744. The Air and Radiation Docket and Information Center's Web site is <http://www.epa.gov/oar/docket.html>. The electronic mail (e-mail) address for the Air and Radiation Docket is: a-and-r-

Docket@epa.gov, the telephone number is (202) 566-1742, and the fax number is (202) 566-9744. An electronic version of the public docket is available through the federal government's electronic public docket and comment system. You may access EPA dockets at <http://www.regulations.gov>. After opening the www.regulations.gov website, enter EPA-HQ-OAR-2011-0549 in the "Enter Keyword or ID" fill-in box to view documents in the record. Although a part of the official docket, the public docket does not include Confidential Business Information ("CBI") or other information whose disclosure is restricted by statute.

EPA's Office of Transportation and Air Quality ("OTAQ") maintains a webpage that contains general information on its review of California waiver requests. Included on that page are links to prior waiver *Federal Register* notices, some of which are cited in today's notice. The page can be accessed at <http://www.epa.gov/otaq/cafr.htm>.

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SUPPLEMENTARY INFORMATION:

I. Background

A. California's Commercial Harbor Craft Regulations

In a letter dated April 12, 2010, CARB submitted to EPA its request pursuant to section 209(e) of the Clean Air Act ("CAA" or "the Act"), regarding its regulations to enforce emission standards for new and in-use commercial harbor craft operated within

California waters and twenty-four nautical miles of the California baseline (“commercial harbor craft regulations”).¹ The CARB Board approved the commercial harbor craft regulations at its November 15, 2007 hearing (by Resolution 07-47).² After making modifications, as directed by the Board, CARB’s Executive Officer formally adopted the rulemaking in Executive Order R-08-007 on September 2, 2008.³ CARB’s commercial harbor craft regulations became operative under California state law on November 19, 2008.⁴ The regulations are codified in title 13, California Code of Regulations (CCR), section 2229.5 and title 17, CCR section 93118.5.⁵

California’s commercial harbor craft regulations establish emission standards, requirements related to the control of emissions, and enforcement provisions. The requirements are applicable to diesel propulsion and auxiliary engines on new and in-use commercial harbor crafts, with some exceptions.⁶ Commercial harbor craft include a variety of different types of vessels, including ferries, excursion vessels, tugboats, towboats, and commercial and charter fishing boats. Approximately eighty percent of commercial harbor craft engines operating in California are previously unregulated diesel engines, accounting for approximately 3.3 tons per day (tpd) of diesel particulate matter (PM) and 73 tpd of oxides of nitrogen (NO_x). California’s commercial harbor craft regulations aim to reduce these emissions so that California can meet the 2014 National Ambient Air Quality Standards (NAAQS) deadline for PM_{2.5} in the South Coast Air

¹ Letter from James Goldstene to Lisa P. Jackson, EPA-HQ-OAR-2011-0549-0001.

² CARB, Resolution 07-47, EPA-HQ-OAR-2011-0549-0027.

³ CARB, Executive Order R-08-007, EPA-HQ-OAR-2011-0549-0030.

⁴ See CARB, Approval Notice, EPA-HQ-OAR-2011-0549-0035.

⁵ See CARB, Final Regulation Order, EPA-HQ-OAR-2011-0549-0034.

⁶ See CARB, Authorization Support Document, p. 5, EPA-HQ-OAR-2011-0549-0002 (hereinafter “CARB Support Document”).

Basin. The commercial harbor craft regulations apply separately to new and in-use engines used on harbor craft.⁷

For new harbor craft, each propulsion and auxiliary diesel engine on the vessel is required to be certified to the most stringent federal new marine engine emission standards for that engine's power rating and displacement in effect at the time of sale, lease, rent, or acquisition.⁸ The regulation imposes additional requirements for larger new ferries (with the capacity to transport seventy-five or more passengers), either by using best available control technology ("BACT"),⁹ or by using a federal Tier 4 certified propulsion engine.

For in-use harbor craft, new or in-use diesel engines may not be sold, offered for sale, leased, rented, or acquired unless the diesel propulsion or auxiliary engines are certified to at least the federal Tier 2 or Tier 3 marine emission standards for new engines of the same power rating and displacement.¹⁰ In-use emission requirements are imposed on Tier 0 and Tier 1 marine engines in ferries, excursion vessels, tugboats, towboats, push boats, and multipurpose harbor craft. Those harbor craft are required to meet emission limits equal to or cleaner than the federal new marine engine certification standards in effect for the year that in-use engine compliance is required.

California's commercial harbor craft regulations also impose requirements related to monitoring, reporting and recordkeeping of compliance on owners and operators of new and in-use harbor craft.¹¹ Subject to CARB approval, harbor craft owners and

⁷ CARB Support Document, pp. 2-6.

⁸ CARB Support Document at 2.

⁹ BACT is the diesel emission control strategy (DECS) determined by CARB to be the greatest feasible reduction of NO_x or PM.

¹⁰ CARB Support Document at 3.

¹¹ CARB Support Document at 5.

operators may opt to meet requirements by implementing alternative emission control strategies.

B. Clean Air Act Nonroad Engine and Vehicle Authorizations

Section 209(e)(1) of the Act permanently preempts any State, or political subdivision thereof, from adopting or attempting to enforce any standard or other requirement relating to the control of emissions for certain new nonroad engines or vehicles. Section 209(e)(2) of the Act requires the Administrator to grant California authorization to enforce its own standards for new nonroad engines or vehicles that are not listed under section 209(e)(1), subject to certain restrictions. On July 20, 1994, EPA promulgated a rule that sets forth, among other things, the criteria, as found in section 209(e)(2), which EPA must consider before granting any California authorization request for new nonroad engine or vehicle emission standards. On October 8, 2008, the regulations promulgated in that rule were moved to 40 CFR Part 1074, and modified slightly.¹² As stated in the preamble to the section 209(e) rule, EPA has historically interpreted the section 209(e)(2)(iii) “consistency” inquiry to require, at minimum, that California standards and enforcement procedures be consistent with section 209(a),

¹² The applicable regulations, now in 40 CFR part 1074, subpart B, § 1074.105, provide:

(a) The Administrator will grant the authorization if California determines that its standards will be, in the aggregate, at least as protective of public health and welfare as otherwise applicable federal standards.

(b) The authorization will not be granted if the Administrator finds that any of the following are true:

(1) California’s determination is arbitrary and capricious.

(2) California does not need such standards to meet compelling and extraordinary conditions.

(3) The California standards and accompanying enforcement procedures are not consistent with section 209 of the Act.

(c) In considering any request from California to authorize the state to adopt or enforce standards or other requirements relating to the control of emissions from new nonroad spark-ignition engines smaller than 50 horsepower, the Administrator will give appropriate consideration to safety factors (including the potential increased risk of burn or fire) associated with compliance with the California standard.

section 209(e)(1), and section 209(b)(1)(C) (as EPA has interpreted that subsection in the context of section 209(b) motor vehicle waivers).¹³

In order to be consistent with section 209(a), California's nonroad standards and enforcement procedures must not apply to new motor vehicles or new motor vehicle engines. To be consistent with section 209(e)(1), California's nonroad standards and enforcement procedures must not attempt to regulate engine categories that are permanently preempted from state regulation. To determine consistency with section 209(b)(1)(C), EPA typically reviews nonroad authorization requests under the same "consistency" criteria that are applied to motor vehicle waiver requests. Pursuant to section 209(b)(1)(C), the Administrator shall not grant California a motor vehicle waiver if she finds that California "standards and accompanying enforcement procedures are not consistent with section 202(a)" of the Act. Previous decisions granting waivers and authorizations have noted that state standards and enforcement procedures are inconsistent with section 202(a) if: (1) there is inadequate lead time to permit the development of the necessary technology giving appropriate consideration to the cost of compliance within that time, or (2) the federal and state testing procedures impose inconsistent certification requirements.

C. Burden of Proof

In *Motor and Equip. Mfrs Assoc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979) ("*MEMA I*"), the U.S. Court of Appeals stated that the Administrator's role in a section 209 proceeding is to:

consider all evidence that passes the threshold test of materiality and . . . thereafter assess such material evidence against a standard of proof to determine whether the parties favoring a denial of the waiver have shown

¹³ See 59 FR 36969 (July 20, 1994).

that the factual circumstances exist in which Congress intended a denial of the waiver.¹⁴

The court in *MEMA I* considered the standards of proof under section 209 for the two findings related to granting a waiver for an “accompanying enforcement procedure” (as opposed to the standards themselves): (1) protectiveness in the aggregate and (2) consistency with section 202(a) findings. The court instructed that “the standard of proof must take account of the nature of the risk of error involved in any given decision, and it therefore varies with the finding involved. We need not decide how this standard operates in every waiver decision.”¹⁵

The court upheld the Administrator’s position that, to deny a waiver, there must be ‘clear and compelling evidence’ to show that proposed procedures undermine the protectiveness of California’s standards.¹⁶ The court noted that this standard of proof also accords with the congressional intent to provide California with the broadest possible discretion in setting regulations it finds protective of the public health and welfare.¹⁷

With respect to the consistency finding, the court did not articulate a standard of proof applicable to all proceedings, but found that the opponents of the waiver were unable to meet their burden of proof even if the standard were a mere preponderance of the evidence. Although *MEMA I* did not explicitly consider the standards of proof under section 209 concerning a waiver request for “standards,” as compared to accompanying enforcement procedures, there is nothing in the opinion to suggest that the court’s analysis would not apply with equal force to such determinations. EPA’s past waiver decisions have consistently made clear that: “[E]ven in the two areas concededly reserved

¹⁴ *MEMA I*, 627 F.2d at 1122.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

for Federal judgment by this legislation – the existence of ‘compelling and extraordinary’ conditions and whether the standards are technologically feasible – Congress intended that the standards of EPA review of the State decision to be a narrow one.”¹⁸

Opponents of the waiver bear the burden of showing that the criteria for a denial of California’s waiver request have been met. As found in *MEMA I*, this obligation rests firmly with opponents of the waiver in a section 209 proceeding:

[t]he language of the statute and it’s legislative history indicate that California’s regulations, and California’s determinations that they must comply with the statute, when presented to the Administrator are presumed to satisfy the waiver requirements and that the burden of proving otherwise is on whoever attacks them. California must present its regulations and findings at the hearing and thereafter the parties opposing the waiver request bear the burden of persuading the Administrator that the waiver request should be denied.¹⁹

The Administrator’s burden, on the other hand, is to make a reasonable evaluation of the information in the record in coming to the waiver decision. As the court in *MEMA I* stated: “here, too, if the Administrator ignores evidence demonstrating that the waiver should not be granted, or if he seeks to overcome that evidence with unsupported assumptions of his own, he runs the risk of having his waiver decision set aside as ‘arbitrary and capricious.’”²⁰ Therefore, the Administrator’s burden is to act “reasonably.”²¹

D. EPA’s Administrative Process in Consideration of California’s Commercial Harbor Craft Regulations

Upon review of CARB’s request, EPA offered an opportunity for a public hearing, and requested written comment on issues relevant to a full section 209(e)

¹⁸ See, e.g., 40 FR 21102-103 (May 28, 1975).

¹⁹ *MEMA I*, 627 F.2d at 1121.

²⁰ *Id.* at 1126.

²¹ *Id.* at 1126.

authorization analysis, by publication of a *Federal Register* notice on June 29, 2011.²²

Specifically, we requested comment on: (a) whether CARB's determination that its standards, in the aggregate, are at least as protective of public health and welfare as applicable federal standards is arbitrary and capricious, (b) whether California needs such standards to meet compelling and extraordinary conditions, and (c) whether California's standards and accompanying enforcement procedures are consistent with section 209 of the Act.

In response to EPA's June 29, 2011 *Federal Register* notice, EPA received two written comments. The written comments are from the American Waterways Operators ("AWO")²³ and K-Sea Transportation Partners L.P. ("K-Sea").²⁴ AWO initially requested a public hearing, and later withdrew that request. After the close of the comment period, EPA met with AWO to discuss comments from their members.²⁵

AWO comments that California does not need the new standards to meet compelling and extraordinary conditions. AWO also comments that California's standards and enforcement procedures are not consistent with the Clean Air Act section 209. Additionally, AWO expressed other concerns in their comments related to the commercial harbor craft regulation's compliance schedules.

K-Sea comments that the new regulations are not consistent with section 202(a) of the Clean Air Act. K-Sea also comments that California does not need the new regulations to meet compelling and extraordinary conditions. Additionally, K-Sea does

²² 76 FR 38153 (June 29, 2011).

²³ The American Waterways Operators ("AWO"), Comments, EPA-HQ-OAR-2011-0549-0038 (hereinafter "AWO Comments").

²⁴ K-Sea Transportation Partners L.P. ("K-Sea"), Comments, EPA-HQ-OAR-2011-0549-0037 (hereinafter "K-Sea Comments").

²⁵ EPA, "Memorandum from Tayyaba Waqar to Docket EPA-HQ-OAR-2011-0549," EPA-HQ-OAR-2011-0549-0039.

not believe that CARB adequately assessed the financial impacts and compliance costs associated with implementation of California's commercial harbor craft regulations.

II. Discussion

A. California's Protectiveness Determination

Section 209(e)(2)(i) of the Act instructs that EPA cannot grant an authorization if the agency finds that CARB was arbitrary and capricious in its determination that its standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards. CARB's Board made a protectiveness determination in Resolution 07-47, finding that California's commercial harbor craft regulation will not cause the California emission standards, in the aggregate, to be less protective of public health and welfare than applicable federal standards.²⁶ CARB asserts that EPA has no basis to find that the CARB Board's determination is arbitrary or capricious.²⁷ CARB points out that most of the commercial harbor craft requirements (for new diesel engines in newly acquired harbor craft and ferry propulsion engines) are identical to the federal requirements for those engines. CARB also highlights that its requirements for new propulsion diesel engines in larger new ferries are more stringent than federal standards because they additionally require BACT technology. With respect to the commercial harbor craft regulation's in-use requirements, CARB additionally asserts that its requirements are more stringent than applicable federal regulations because EPA does not have the authority to regulate in-use nonroad engines.

²⁶ "BE IT FURTHER RESOLVED that the Board hereby determines, in accordance with section 209(e)(2) of the CAA, that to the extent the regulation approved herein affects nonroad engines as defined in CAA section 216(10) and (11), the emission standards and other requirements related to the control of emissions in the regulation approved herein are, in the aggregate, at least as protective of public health and welfare as applicable federal standards; California needs its nonroad emission standards to meet compelling and extraordinary conditions; and the standards and accompanying enforcement procedures approved herein are consistent with CAA section 209." CARB Resolution 07-47, EPA-HQ-OAR-2011-0549-0028.

²⁷ CARB Support Document at 7-8.

No commenter expressed an opinion or presented evidence suggesting that CARB was arbitrary and capricious in making its above-noted protectiveness findings or that CARB's requirements are not, in the aggregate, as stringent as applicable federal standards. Therefore, based on the record before us, EPA finds that opponents of the authorization have not shown that California was arbitrary and capricious in its determination that its standards are, in the aggregate, at least as protective of public health and welfare as applicable federal standards.

B. Need for California Standards to Meet Compelling and Extraordinary Conditions

Section 209(e)(2)(ii) of the Act instructs that EPA cannot grant an authorization if the agency finds that California “does not need such California standards to meet compelling and extraordinary conditions.” This criterion restricts EPA’s inquiry to whether California needs its own mobile source pollution program to meet compelling and extraordinary conditions, and not whether any given standards are necessary to meet such conditions.²⁸ As discussed above, for over forty years CARB has repeatedly demonstrated the need for its motor vehicle emissions program to address compelling and extraordinary conditions in California. In its Resolution 07-47, CARB re-affirmed its longstanding position that California continues to need its nonroad emission standards to meet its serious air pollution problems. Likewise, EPA has consistently recognized that California continues to have the same “geographical and climatic conditions that, when combined with the large numbers and high concentrations of automobiles, create serious pollution problems.”²⁹

²⁸ See 74 FR 32744, 32761 (July 8, 2009); 49 FR 18887, 18889-18890 (May 3, 1984).

²⁹ 49 FR 18887, 18890 (May 3, 1984); *see also* 76 FR 34693 (June 14, 2011), 74 FR 32744, 32763 (July 8, 2009), and 73 FR 52042 (September 8, 2008).

AWO asserts that California does not need the commercial harbor craft regulations to meet compelling and extraordinary conditions. AWO focuses on California's goal of improving upon the South Coast Air Basin's non-attainment status by reducing NO_x and PM_{2.5} levels. AWO states that there is no justification for CARB to adopt statewide regulations of NO_x and PM_{2.5} in order to meet the 2014 NAAQS deadline for PM_{2.5} in the South Coast Air Basin. AWO reviewed CARB's Initial Statement of Reasons ("ISOR") and believes that the ISOR does not provide sufficient detail to explain the relationship between pollutant exceedances and commercial harbor craft emissions. Additionally, AWO believes that the data CARB used from 2006 and earlier for its analysis of commercial harbor craft's contribution to NO_x and PM_{2.5} levels is inaccurate and outdated in that it does not represent the most current operation of tugboats in California waters. AWO also points to CARB's statements regarding decrease in emissions for diesel NO_x and PM_{2.5} because of other effects and factors. Further, in comparing data for emission reductions with and without the proposed standards, AWO concludes that CARB's emission reduction goals would be met without implementing the commercial harbor craft regulation.

K-Sea also asserts that California does not need the commercial harbor craft regulation to meet compelling and extraordinary conditions. K-Sea argues that California used data from 2006 and earlier in its rulemaking, which is outdated and inaccurate. K-Sea bases that argument on its belief that because of the recession, which started in 2008, emissions have already been in decline. K-Sea also states that the data CARB used to assess harbor craft emissions from tugboats in coastwise service did not accurately

capture their duty cycles or operations within the 24-mile zone of the California regulated waters.

AWO and K-Sea have both presented arguments and information suggesting that California does not need its commercial harbor craft regulations to meet compelling and extraordinary conditions. However, as discussed above, EPA's inquiry under the section 209(e)(2)(ii) criterion restricts EPA's inquiry to whether California needs its own mobile source air pollution program to meet compelling and extraordinary conditions, and not whether any given standards are necessary to meet such conditions.³⁰ Congress decided in 1977 to allow California to promulgate individual standards that are not as stringent as comparable federal standards, as long as the standards are "in the aggregate, at least as protective of public health and welfare as applicable federal standards." This decision by Congress requires EPA to allow California to promulgate individual standards that are part of California's overall approach to reducing mobile source emissions to address air pollution problems. Congress intended to provide California the "broadest possible discretion" in selecting the best means to protect its citizens and the public welfare and did not intend for EPA to weigh which particular regulations are most appropriate for California to implement to protect public health and welfare. Consequently, Congress provided EPA a much more limited role in considering objections raised by opponents of the waiver.

Although AWO and K-Sea believe that California does not need its commercial harbor craft regulations to meet compelling and extraordinary conditions, CARB has provided evidence that it does. In the California rulemaking, CARB explained its need

³⁰ See 74 FR 32744, 32761 (July 8, 2009); 49 FR 18887, 18889-18890 (May 3, 1984).

for the commercial harbor craft regulation.³¹ Regarding the comment that California's air quality problems are limited to the South Coast Air Basin, EPA has never suggested in previous authorization or waiver proceedings that localized air quality concerns are not sufficient to receive authorization under this criterion. However, even if EPA were to accept this comment for the sake of argument, CARB has explained that it has statewide goals and federal Clean Air Act requirements to reduce NO_x and PM_{2.5} emissions. CARB explained that NO_x and PM_{2.5} reductions are necessary because of the relationship between those pollutants and the federal non-attainment status in both the South Coast and San Joaquin Valley air basins:

The South Coast and San Joaquin Valley air basins are the two areas in the State that exceed the annual PM_{2.5} standards. These areas are required by federal law to develop State Implementation Plans (SIPs) describing how they will attain the standards by 2015. The U.S. EPA further requires that all necessary emission reductions be achieved one calendar year sooner – by 2014 – in recognition of the annual average form [sic] the standard. NO_x emission reductions are needed because NO_x leads to formation in the atmosphere of both ozone and PM_{2.5}; diesel PM emission reductions are needed because diesel PM contributes to ambient concentrations of PM_{2.5}. San Joaquin Valley and South Coast air basins are also in non-attainment for the federal ozone standard. . . .

While all sources of NO_x emissions are important, marine vessels, which include commercial harbor craft engines, are one of several key contributors to PM_{2.5} that will determine whether California is able to meet the 2014 deadline for PM_{2.5} attainment in the South Coast air basin.

. . . Staff projects that the regulation would reduce in-use harbor craft diesel PM emissions about 70 percent and NO_x emissions about 60 percent from the 2004 baseline by 2020. These emission reductions would occur in areas along waterways, near ports, and in those communities surrounding these areas, as well as further inland.

The regulation would also reduce diesel PM and NO_x emissions that contribute to exceedances throughout the State of ambient air quality standards for both PM_{2.5} and ozone. These reductions would assist California in its goal of achieving state and federal air quality standards.

³¹ CARB, Technical Support Document, EPA-HQ-OAR-2011-0549-0007, pp. I-1-I-3.

The emission reductions from the proposed regulation would result in lower ambient PM levels and reduced exposure to diesel PM. Staff estimates that approximately 310 premature deaths statewide would be avoided by year 2025 from implementation of the proposed regulation. The estimated cost benefit of the avoided premature deaths and other health benefits due to the emission reductions are estimated to range from \$1.3 to \$2.0 billion.³²

Thus, contrary to AWO's argument, CARB presents that it does need statewide commercial harbor craft regulations, because NO_x and PM pollution problems affect the entire state.

Although AWO and K-Sea claim that California's 2006 data is outdated, because emissions have decreased since 2008 due to the recession and other emission reduction strategies, they have not presented evidence proving this to be the case. EPA must rely on the record in front of us. Moreover, while both AWO and K-Sea suggest that California may have overstated the emission contributions from harbor craft, they do not show that harbor craft do not contribute to emissions that affect California's air quality. While the level of air pollution may go to the overall benefits of the program, it is not relevant for determining the need for California's nonroad engine program. Indeed, AWO's comments make clear that the harbor craft regulations will result in emission reductions.³³

Moreover, AWO's argument relies on California's other emission reduction strategies to make its case, but it is inappropriate for EPA to decide which California regulations are needed, and which are not. CARB presented that they expect the emission reductions from the commercial harbor craft regulation to benefit the entire state

³² *Id.*

³³ For example, AWO analyzed CARB's ISOR, and found that California's commercial harbor craft regulation would achieve "only 10 percent" of California's total estimated statewide PM emission reductions and "only 6 percent" of California's total estimated statewide NO_x reductions.

in meeting federal standards and reaching their statewide emission reduction goals.

While AWO believes California's state goals will be met without the commercial harbor craft regulation, they do not present evidence to support that belief, nor do they suggest that the San Joaquin or South Coast air basins would actually meet federal ozone and PM standards without the commercial harbor craft regulation. Nor would it be appropriate for EPA to decide that the other emission controls on which AWO relies are necessary but the controls on commercial harbor craft are not. Aside from the fact that all sources of pollution could argue that other sources should be regulated instead of them, EPA's review is not intended to replace the policy decisions of California in determining the appropriate emission control strategies it will use to meet its air quality needs.

Based on the above, those opposing the authorization have not met the burden of proof necessary for EPA to find that California no longer needs a separate mobile source emissions program to address compelling and extraordinary conditions in California. Therefore, EPA has determined that we cannot deny California authorization for its commercial harbor craft regulations under section 209(e)(2)(ii).

C. Consistency with Section 209 of the Clean Air Act

Section 209(e)(2)(iii) of the Act instructs that EPA cannot grant an authorization if California's standards and enforcement procedures are not consistent with section 209. As described above, EPA has historically evaluated this criterion for consistency with sections 209(a), 209(e)(1), and 209(b)(1)(C).

1. Consistency with Section 209(a)

To be consistent with section 209(a) of the Clean Air Act, California's commercial harbor craft regulations must not apply to new motor vehicles or new motor

vehicle engines. California's commercial harbor craft regulations apply to nonroad engines, not on-highway motor vehicles or engines. CARB states that the new vessel requirements regulate new diesel engines, and apply only to nonroad engines that are neither new motor vehicles nor new motor vehicle engines. No commenter presented otherwise; therefore, EPA cannot deny California's request on the basis that California's commercial harbor craft regulations are not consistent with section 209(a).

2. Consistency with Section 209(e)(1)

To be consistent with section 209(e)(1) of the Clean Air Act, California's commercial harbor craft regulations must not affect new farming or construction vehicles or engines that are below 175 horsepower, or new locomotives or their engines. CARB presents that commercial harbor craft engines are not used in locomotives and are not primarily used in farm and construction equipment vehicles. No commenter presented otherwise; therefore, EPA cannot deny California's request on the basis that California's commercial harbor craft requirements are not consistent with section 209(e)(1).

3. Consistency with Section 209(b)(1)(C)

The requirement that California's standards be consistent with section 209(b)(1)(C) of the Clean Air Act effectively requires consistency with section 202(a) of the Act. California standards are inconsistent with section 202(a) of the Act if there is inadequate lead-time to permit the development of technology necessary to meet those requirements, giving appropriate consideration to the cost of compliance within that time. California's accompanying enforcement procedures would also be inconsistent with section 202(a) if the federal and California test procedures were not consistent. The scope of EPA's review of whether California's action is consistent with section 202(a) is

narrow. The determination is limited to whether those opposed to the authorization or waiver have met their burden of establishing that California's standards are technologically infeasible, or that California's test procedures impose requirements inconsistent with the federal test procedure.³⁴

a. Technological Feasibility

Congress has stated that the consistency requirement of section 202(a) relates to technological feasibility.³⁵ Section 202(a)(2) states, in part, that any regulation promulgated under its authority "shall take effect after such period as the Administrator finds necessary to permit the development and application of the requisite technology, giving appropriate consideration to the cost of compliance within such period." Section 202(a) thus requires the Administrator to first determine whether adequate technology already exists; or if it does not, whether there is adequate time to develop and apply the technology before the standards go into effect. The latter scenario also requires the Administrator to decide whether the cost of developing and applying the technology within that time is feasible. Previous EPA waivers are in accord with this position.³⁶ For example, a previous EPA waiver decision considered California's standards and enforcement procedures to be consistent with section 202(a) because adequate technology existed as well as adequate lead-time to implement that technology.³⁷ Subsequently, Congress has stated that, generally, EPA's construction of the waiver provision has been consistent with congressional intent.³⁸

³⁴ *MEMA I*, 627, F.2d at 1126.

³⁵ H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 301 (1977).

³⁶ *See, e.g.*, 49 FR 1887, 1895 (May 3, 1984); 43 FR 32182, 32183 (July 25, 1978); 41 FR 44209, 44213 (October 7, 1976).

³⁷ 41 FR 44209 (October 7, 1976).

³⁸ H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 301 (1977).

CARB presents that the technological feasibility of most of the commercial harbor craft requirements are “clearly technologically feasible” because they mirror requirements that EPA has already adopted and determined were technologically feasible after considering cost of compliance when setting its Tier 2, 3, and 4 emission standards.³⁹ Such is the case for the new vessel engine requirements, for which compliance is based on meeting applicable federal Tier 2, 3, or 4 emission standards. Larger new ferry propulsion engines must similarly meet applicable federal standards, with those that meet Tier 2 or 3 federal standards also required to be equipped with BACT. CARB states that the BACT requirement is technologically feasible because a BACT determination is made on a case-by-case assessment of technological availability for each specific ferry application. If no BACT is available for a specific ferry application, compliance with federal Tier 2 or 3 standards is all that is required. This aspect of California’s commercial harbor craft regulations is the only aspect which does not rely upon compliance with a federal standard; for this aspect, CARB contends that the cost of compliance on ferry owners and operators will largely be passed along to customers without significant economic disruption. CARB’s in-use requirements also rely on compliance with federal emission standards and includes four compliance options: (1) engine replacement with new federal Tier 2 or 3 compliant engines, (2) demonstrating compliance with federal Tier 2 or 3 standards (*e.g.*, rebuilding), (3) demonstrating that a vessel will not operate more than three hundred hours in a compliance year, and (4) flexibility through exemptions and compliance extensions.

EPA did not receive any comments suggesting that California’s commercial harbor craft regulations are technologically infeasible. EPA did receive comments –

³⁹ CARB Support Document at 9-13.

from AWO and K-Sea – suggesting that CARB did not adequately address the cost of compliance within the lead-time provided.

AWO asserts that California’s commercial harbor craft regulations are inconsistent with section 202(a) because there has been inadequate lead-time to permit the development and widespread commercial availability of the technology necessary to comply, and CARB has not given appropriate consideration to the cost of compliance within the lead-time provided. AWO further asserts that approximately four-fifths of the towing vessel fleet is equipped with pre-Tier 1 or Tier 1 certified engines, and current regulations only require use of an EPA-approved kit, if available; California’s commercial harbor craft regulations, on the other hand, will require these vessels to rebuild with a Tier 2 kit or completely repower. AWO also asserts that CARB does not address the cost of a retrofit versus the cost of replacement; this, AWO believes, is a failure to provide adequate lead-time, “with appropriate consideration to the cost of compliance.” AWO emphasizes that its members cannot afford these costs, particularly because ninety percent of the towing industry is comprised of small businesses. Additionally, AWO stresses that these cost concerns (*e.g.*, vessel downtime required during drydocks, the residual value of engine replacement, cost of installation and maintenance, equipment and shipyard availability) were not given full consideration by CARB. AWO believes that many towing companies may be forced to cease operations in California. Furthermore, even though California provides funding options, AWO asserts that such funding is largely unavailable for AWO members because they do not primarily operate within California. AWO believes that the cost increases associated

with the commercial harbor craft regulation will drive up the cost of waterways transportation.

K-Sea also believes that CARB did not adequately assess the financial impacts and cost of compliance. K-Sea emphasizes that out of its 18 tugs, they would need to replace 13. K-Sea informs EPA that they cannot afford this, and will be forced to either make a radical capital investment to comply, or cease operating in California. K-Sea represents that they cannot obtain CARB funding because it does not operate primarily in California. K-Sea also states that they could relocate compliant vessels to California, which would merely shift pollution out of state. K-Sea believes this renders the “necessity of the regulation to be ‘arbitrary and capricious’...”

EPA’s review with regard to cost of compliance occurs within the context of its review of whether California’s commercial harbor craft regulations are consistent with section 202(a) of the Clean Air Act. As described above, EPA’s review here is narrow. That is, section 202(a) consistency calls for a limited review of technological feasibility, including analysis of the cost of new technology, if technology does not currently exist. Section 202(a) does not allow EPA to conduct a more searching review of whether the costs are outweighed by the overall benefits of the California regulations. In this case, no party has objected to CARB’s demonstration that technologies are in existence and are being used in actual operation; AWO and K-Sea only challenge the cost of compliance. EPA’s traditional review of costs considers whether the cost of compliance per engine would render the regulation cost prohibitive and thus infeasible. Here, CARB understands that there are significant costs associated with compliance, but it expects those costs to eventually be passed on to the consumer, without significant impact on the

industry. AWO and K-Sea, on the other hand, present that compliance with the commercial harbor craft regulations would impose unreasonable costs that could lead operators to cease operations in California. AWO and K-Sea did not further express that the costs associated with compliance would render compliance entirely infeasible. Notably, CARB responded to similar if not identical concerns from industry – including comments from AWO – during the California rulemaking.⁴⁰ In response to comments with respect to the significant costs of compliance and impact on the industry, CARB stood by its rulemaking findings. CARB addressed the many points AWO and K-Sea now raise in this proceeding. Specifically, CARB stated, among other things, that it does not believe the commercial harbor craft regulation will have significant economic impacts; that the potential impacts on affected tugboat and towboat businesses will, on average, decrease a business's return on investment by 3.6 and 0.5 percent, respectively; that engine replacement is the most expensive compliance option, but there may be other less costly options, including rebuilding, employing emission control technologies, applying for approval of alternative control of emissions plan, or applying for compliance extensions; that tugboats will be able to pass on the added compliance costs to their customers; that the regulation will not result in job losses or significant impact on tugboat businesses because they provide a necessary service that will continue to be in high demand; and that CARB has given six years of lead-time for businesses to plan for compliance in which they may apply for incentive funds or choose other less costly compliance options. In previous waiver and authorization determinations, EPA has consistently given California substantial deference on its policy judgments, including those related to the costs associated with compliance. For example, in a previous

⁴⁰ CARB, "Final Statement of Reasons for Rulemaking," EPA-HQ-OAR-2011-0549-0032, pp. 57-67.

authorization determination where cost of compliance was an issue, EPA stated:

“CARB’s regulations are feasible with respect to cost objectively; i.e., all fleet operators face the same cost per unit to comply. While this cost may have different impacts on fleets of varying sizes, EPA recognizes that it is up to CARB to choose who it will regulate under its standards.”⁴¹ Similarly here, EPA is in no position to second-guess CARB’s regulatory choices. Because the cost of compliance is not so burdensome to render compliance options out of reach, the fact that some operators may have difficulties with the cost of compliance does not render the program infeasible.

Therefore, based on the record before us, EPA finds that opponents of the authorization have not met their burden of proof. Consequently, EPA cannot deny California’s authorization based on technological infeasibility.

b. Consistency of Certification Procedures

California’s standards and accompanying enforcement procedures would also be inconsistent with section 202(a) if the California test procedures were to impose certification requirements inconsistent with the federal certification requirements. Such inconsistency means that manufacturers would be unable to meet both the California and federal testing requirements using the same test vehicle or engine.⁴²

CARB presents that none of the commercial harbor craft requirements pose any inconsistency as between California and federal test procedures. CARB asserts that the compliance methods for new vessel engines are EPA’s Tier 2, 3, or 4 federal marine engine test procedures. For larger new ferries, CARB also relies on federal marine engine test procedures, and asserts that the added BACT requirement is not inconsistent

⁴¹ EPA, Authorization of In-Use Emission Standards for Transport Refrigeration Unit Engines,” January 9, 2009, at 63.

⁴² See, e.g., 43 FR 32182 (July 25, 1978).

with federal procedures because EPA has no comparable requirement. The regulation's in-use requirements also rely on federal marine engine test procedures. CARB further presents that the in-use requirements are not inconsistent with federal requirements because EPA does not have any comparable in-use standards and test procedures.

EPA received no comments suggesting that CARB's commercial harbor craft requirements pose a test procedure consistency problem. Therefore, based on the record, EPA cannot find that CARB's testing procedures are inconsistent with section 202(a). Consequently, EPA cannot deny CARB's request based on this criterion.

D. Other Issues

AWO requests that the compliance dates for the affected vessels be reset according to the date that EPA approves California's authorization request to facilitate compliance. AWO also expressed concerns about inconsistent regulation for vessels engaged in interstate commerce. K-Sea echoed a similar concern, stating that the regulations will shift the burden of dealing with emissions to other states because companies may choose to relocate a non-CARB compliant engine to operations elsewhere. With respect to AWO's request for a delayed compliance schedule, EPA cannot change an aspect of California's regulation. EPA is only authorized to review California's standards to determine compliance with section 209. It is not authorized to change California's regulations. With respect to the AWO and K-Sea comments regarding the interstate implications of California's commercial harbor craft regulations, that issue is also beyond the scope of EPA's review under the three section 209(e)(2) criteria. As EPA has stated on numerous occasions, sections 209(b) and 209(e) of the Clean Air Act limit our authority to deny California requests for waivers and

authorizations to the three criteria listed therein. As a result, EPA has consistently refrained from denying California's requests for waivers and authorizations based on any other criteria.⁴³ In instances where the U.S. Court of Appeals has reviewed EPA decisions declining to deny waiver requests based on criteria not found in section 209(b), the Court has upheld and agreed with EPA's determination.⁴⁴ Neither of these other issues AWO and K-Sea raises is among – or fits within the confines of – the criteria listed under section 209(e).⁴⁵ It is clear that Congress intended that California have the ability to promulgate standards that are more stringent than those that would otherwise apply to mobile sources under federal regulations. Indeed, other states could also promulgate such standards if they are identical to California's. Therefore, in considering California's commercial harbor craft regulations, EPA may not deny authorization based on these issues.

E. Authorization Determination for California's Commercial Harbor Craft Regulations

After a review of the information submitted by CARB and other parties to this proceeding, EPA finds that those opposing California's request have not met the burden of demonstrating that an authorization for California's commercial harbor craft regulations should be denied based on any of the three statutory criteria of section 209(e)(2). For this reason, EPA finds that an authorization for California's commercial harbor craft regulations should be granted.

III. Decision

⁴³ See, e.g., 74 FR 32744, 32783 (July 8, 2009).

⁴⁴ See *Motor and Equipment Manufacturers Ass'n v. Nichols*, 142 F.3d 449, 462-63, 466-67 (DC Cir.1998), *Motor and Equipment Manufacturers Ass'n v. EPA*, 627 F.2d 1095, 1111, 1114-20 (DC Cir. 1979).

⁴⁵ AWO and K-Sea may raise these issues in a direct challenge to California's regulations in other forums, but these issues are not relevant to EPA's limited review under section 209.

The Administrator has delegated the authority to grant California section 209(b) waivers of preemption and section 209(e) authorizations to the Assistant Administrator for Air and Radiation. After evaluating California's commercial harbor craft regulations, CARB's submissions, and the public comments from AWO and K-Sea, EPA is granting an authorization to California for its commercial harbor craft regulations.

My decision will affect not only persons in California, but also entities outside the State who must comply with California's requirements. For this reason, I determine and find that this is a final action of national applicability for purposes of section 307(b)(1) of the Act. Pursuant to section 307(b)(1) of the Act, judicial review of this final action may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for review must be filed by [INSERT DATE SIXTY DAYS AFTER FR PUBLICATION DATE OF THIS NOTICE]. Judicial review of this final action may not be obtained in subsequent enforcement proceedings, pursuant to section 307(b)(2) of the Act.

IV. Statutory and Executive Order Reviews

As with past authorization and waiver decisions, this action is not a rule as defined by Executive Order 12866. Therefore, it is exempt from review by the Office of Management and Budget as required for rules and regulations by Executive Order 12866.

In addition, this action is not a rule as defined in the Regulatory Flexibility Act, 5 U.S.C. § 601(2). Therefore, EPA has not prepared a supporting regulatory flexibility analysis addressing the impact of this action on small business entities.

Further, the Congressional Review Act, 5 U.S.C. § 801, *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, does not apply because this action is not a rule for purposes of 5 U.S.C. § 804(3).

Dated: December 5, 2011.

Gina McCarthy,
Assistant Administrator,
Office of Air and Radiation.

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